Physicians' Refusal to Wear Masks to Protect Vulnerable Patients—An Ethical Dilemma for the Medical Profession

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On May 11, 2023, the US federal government put an end to the COVID-19–related public health emergency. The US Centers for Disease Control and Prevention (CDC) no longer recommends routine universal masking in most health care settings. Many clinicians and staff at hospitals, clinics, and nursing homes around the country have stopped regularly wearing masks. A conflict might arise when patients who are immunocompromised or have other risk factors that increase their susceptibility to COVID-19 complications seek health care and encounter an unmasked clinician. Individuals who have such conditions are considered disabled under the Americans with Disabilities Act (ADA). Those disabled patients nowadays must embark on a “personal crusade for public health” to have their needs met.

In theory, the solution to the problem should be simple: patients who wear masks to protect themselves, as recommended by the CDC, can ask the staff and clinicians to wear a mask as well when seeing them, and the clinicians would oblige given the efficacy masks have shown in reducing the spread of respiratory illnesses. However, disabled patients report physicians and other clinical staff having refused to wear a mask when caring for them. Although it is hard to know how prevalent this phenomenon is, what recourse do patients have? How should health care systems approach clinicians and staff who refuse to mask when treating a disabled patient?

Physicians have a history of antagonism to the idea that they themselves might present a health risk to their patients. Famously, when Hungarian physician Ignaz Semmelweis originally proposed handwashing as a measure to reduce purpureal fever, he was met with ridicule and ostracized from the profession.

Physicians were also historically reluctant to adopt new practices to protect not only patients but also physicians themselves against infection in the midst of the AIDS epidemic. In 1985, the CDC presented its guidance on workplace transmission, instructing physicians to provide care, “regardless of whether HCWs [health care workers] or patients are known to be infected with HTLV-III/LAV [human T-lymphotropic virus type III/lymphadenopathy-associated virus] or HBV [hepatitis B virus].” These CDC guidelines offered universal precautions, common-sense, nonstigmatizing, standardized methods to reduce infection. Yet, some physicians bristled at the idea that they need to take simple, universal public health steps to prevent transmission, even in cases in which infectivity is unknown, and instead advocated for a medicalized approach: testing or masking only in cases when a patient is known to be infected. Such an individualized medicalized approach fails to meet the public health needs of the moment.

Patients are the ones who pay the price for physicians’ objections to changes in practices, whether it is handwashing or the denial of care as an unwarranted HIV precaution. Yet today, with the enactment of disability antidiscrimination law, patients are protected, at least on the books.

As we have written elsewhere, federal law supports the right of a disabled individual to request masking as a reasonable disability accommodation in the workplace and at schools. Since we published our initial argument, a split on the topic as it relates to school settings has emerged in federal courts. District courts in Virginia, Pennsylvania, Iowa, and the Eighth Circuit and the Eleventh Circuit approved masking as a reasonable accommodation in school settings, whereas district courts in Florida, Pennsylvania, Georgia, and the Fifth Circuit, the Fourth Circuit, and Sixth Circuit did not. We now argue that patients also have the right to request and require those treating them in health...
care settings to wear a mask when caring for them as a reasonable disability accommodation, even if their facilities have ceased doing so universally.

Masking as a disability accommodation in health care settings should be recognized as part of physicians’ ethical obligations. Access to health care is a particularly fraught issue, as people with disabilities often require more frequent and specialized health care than nondisabled individuals. Physicians have an ethical responsibility to promote the well-being of their patients and do no harm. Wearing a mask on a disabled patient’s request to protect them from contracting COVID-19, which could be deadly for that patient, squarely fits within physicians’ ethical obligation to provide for patients’ care and to ensure their ability to safely partake in health care settings.

Disability accommodations, a unique feature in the ADA, are an individualized legal remedy aimed at allowing full and equal access for disabled individuals in all areas of life, including access to health care facilities and services. The accommodation mandate includes allowing “appropriate adjustment or modifications of…policies,” which in this case would be wearing a mask on request from the patient. According to the US Supreme Court, to determine whether wearing a mask when treating a disabled patient could be a reasonable accommodation, the patient needs to show that the accommodation is “reasonable on its face, i.e., ordinarily or in the run of cases.” The use of masks in certain health care settings was well established even before the COVID-19 pandemic. Yet, the pandemic made masks even more commonplace and less expensive, essentially used ordinarily and through the run of cases. Therefore, masking could not be argued to be an undue hardship on the physicians and the staff at health care facilities (meaning an action requiring significant difficulty or expense based on factors listed in the ADA like the nature of the act, the financial cost of the accommodation, or the financial resources of the covered entity [the hospital]).

Thus, we have a legal framework (patients have the right to request accommodations) coupled with an ethical one (physicians should protect vulnerable patients). How can we bring these to bear to address this phenomenon of physicians refusing to mask? The fragmented landscape of physician employment, whereby most physicians are employed by physician groups (either owned by the physicians themselves or by hospitals) and others employed directly by hospitals, makes it difficult to regulate physician behavior. Therefore, we believe this issue requires discussions by relevant regulatory bodies, including state medical boards and specialty boards, credentialing boards of hospitals, and relevant federal agencies such as the CDC or the US Centers for Medicare & Medicaid Services (CMS). We also realize that such changes will not occur without advocacy on the part of patients themselves and their communities.

Starting with medical boards, physicians should be made aware of their legal obligations toward disabled patients regarding masking as an accommodation. A similar campaign was launched recently in regard to the spread of COVID-19 misinformation, with disciplinary actions taken in a few states. Administrative, ethics, and credentialing committees within hospitals should set and enforce rules requiring physicians and staff to mask if being asked to do so by a disabled patient. The Joint Commission, a nongovernmental organization, should include this matter in its reports, as should other organizations (eg, the Leapfrog Group) that grade hospitals on quality and safety. A downgrading of a hospital’s rating due to refusal to mask as an accommodation will create an incentive for the institution to put a policy in place.

Relevant agencies of the federal government, such as the CDC (as it did during the HIV epidemic) and CMS, should also step in, promulgating guidelines to physicians and hospitals on the importance of disability accommodations. Such accommodations could be tied to reimbursement, as with other reportable errors in quality and safety. In particular, hospitals should partner with people with disabilities to help effect change and hear and respond to their concerns.

Recognizing ethical duties and legal rights is an important first step in developing a framework that accommodates patients with disabilities now that universal masking is no longer the norm in many clinical settings, and in particular, as COVID-19 cases are again on the rise.
REFERENCES


